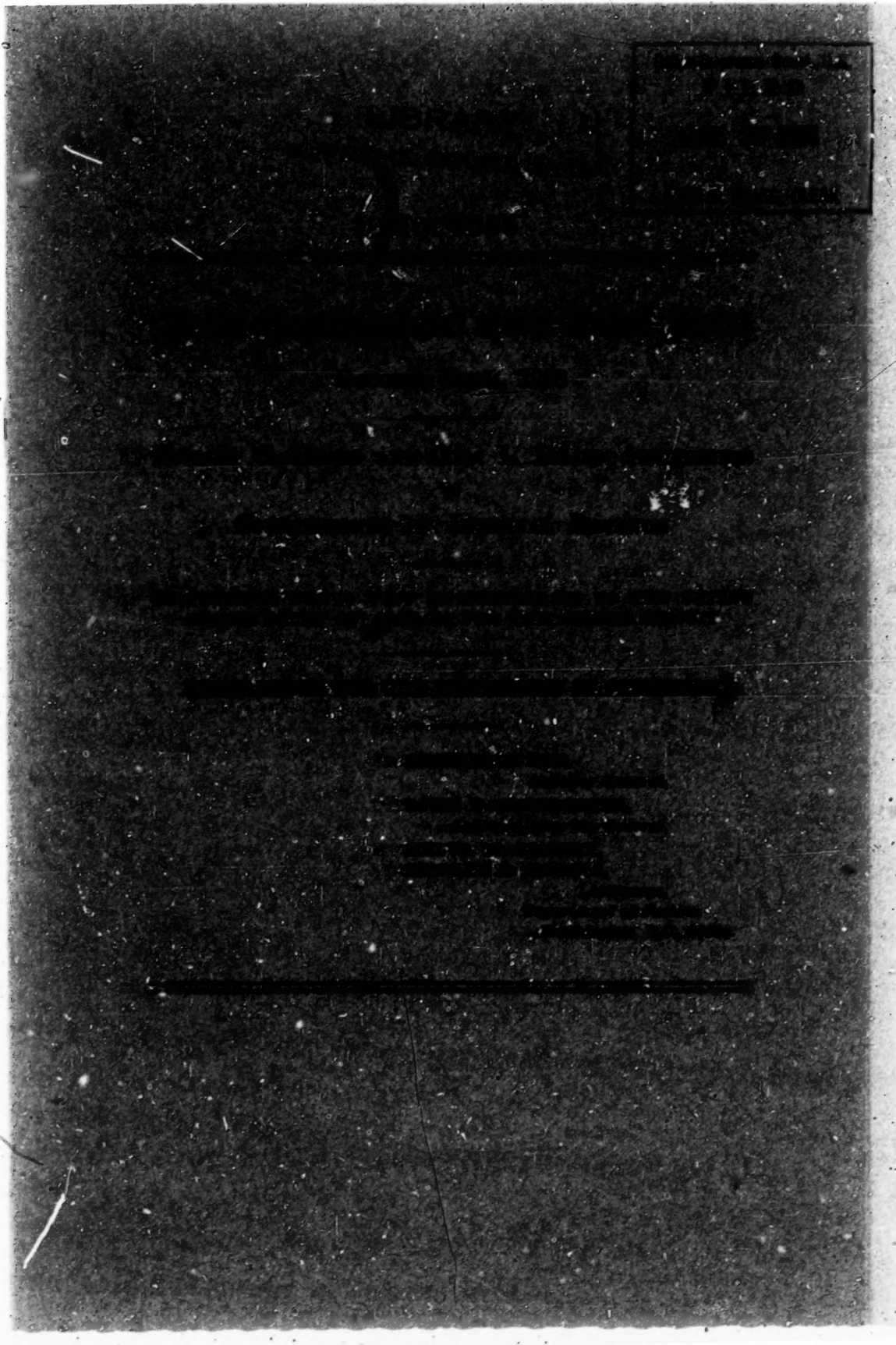


In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1055

EDWARD C. HEARD AND CORA L. HEARD, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

For about 23 years prior to his retirement in 1952, the taxpayer, Edward C. Heard, was an employee in the Government's classified civil service. Upon his retirement, he was entitled to the benefits of the Civil Service Retirement Act, c. 349, 46 Stat. 468, as amended (5 U.S.C. (1952 ed.) 691, *et seq.*; now 5 U.S.C. 2251–2268).[1] Under the Act, he elected to receive an annuity to be paid monthly beginning May 1, 1956. By the end of 1958, the monthly payments he had received exceeded by $2,224.99 the contributions he had made to the Act's retirement

[1] For a detailed explanation of the civil service retirement system in effect as of January 1, 1954, see S. Doc. No. 89, 83d Cong., 2d Sess. (Part 1), pp. 86–103.

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fund through withholdings from his salary during his civilian service.

The Commissioner determined that $2,224.99 of the total monthly payments received by the taxpayer in 1958 was includable in the taxpayer's income under Section 72 of the Internal Revenue Code of 1954 since he had received more than the amount of his contribution within three years of first receiving benefits. The Tax Court sustained his determination. In affirming that decision, the court of appeals held that the amount in question was income within the meaning of Section 61(a) of the Code and, therefore, did not decide whether it was also taxable under Section 72. The questions presented here are (1) whether the amount of $2,224.99 referred to above is income within the meaning of the Internal Revenue Code and the Sixteenth Amendment to the Constitution; and (2) whether the inclusion of that amount in income is an unlawful discrimination against the recipients of civil service retirement benefits in light of the tax exemption granted old age and survivors insurance payments made pursuant to the Social Security Act (42 U.S.C. 301, *et seq.*).

1. The decision below that the $2,224.99 received by the taxpayer in 1958 under the Civil Service Retirement Act constitutes gross income within the meaning of Section 61(a) is correct.[2] This amount

[2] We also submit that $2,224.99 is taxable under Section 72—an issue which the court below did not find it necessary to reach (Pet. 19). This Section on its face covers all annuities and has been consistently ruled by the Commissioner to cover civil service annuity payments. See, *e.g.*, T.D. 3112, 1921-4 Cum. Bull. 76; Treasury Regulations on Income Tax (1954 Code), Sec. 1.61-11 (26 C.F.R. 1.61-11).

of the annuity payments was in excess of the taxpayer's contributions to the Act's retirement fund and thus constituted gain to the taxpayer and not a return of capital. Cf. *Manne* v. *Commissioner*, 155 F. 2d 304 (C.A. 8). Unless specifically exempted, such a gain must be taxed. *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429–430; *United Grocers, Ltd.* v. *United States*, 308 F. 2d 634, 63[illegible] (C.A. 9); *Simpson* v. *United States*, 261 F. 2d 497, 500 (C.A. 7), certiorari denied, 359 U.S. 944; see also *Gen. Investors Co.* v. *Commissioner*, 348 U.S. 434. While the taxpayer suggests that the payments were not for services and therefore constituted a gift (Pet. 7–8), Congress, in establishing the civil service retirement system, was not acting out of disinterested generosity but, instead, was concerned with obtaining for the government the benefits of a more efficient civil service. *United States* v. *Price*, 288 F. 2d 448, 450–451 (C.A. 4); see *Commissioner* v. *Duberstein*, 363 U.S. 278, 285; *Commissioner* v. *LoBue*, 351 U.S. 243, 246. Moreover, as the court of appeals held (Pet. App. 15):

> * * * The Act specifically denominates the benefits as "an annuity;" participation in the retirement program is compulsory for most civilian Government employees; the retirement fund—from which the annuities are paid—consists basically of automatic deductions from the salaries of all participating employees and of regular appropriations by the Government; the point of time when an employee becomes entitled to his annuity depends upon his age, or date of disability, and upon his length of

> service; and the amount to which the employee is entitled is primarily based upon his salary and duration of service.

Since the payments constituted income, the Sixteenth Amendment in terms allows the tax. See *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 17–19; see also *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112–113.

2. The taxpayer contends that Congress unconstitutionally discriminated against recipients of civil service retirement benefits in comparison with those who receive social security retirement payments. The short answer is that Congress provided in Section 37 of the 1954 Code for a credit against the tax otherwise owed of an amount equal to the retirement income received, multiplied by the lowest tax rate (and subject to certain other limitations and requirements set forth in Section 37). Thus, Congress has acted to end any unjustifiable discrimination which may have existed between the recipients of civil service annuity payments (who receive the credit) and of social security payments (who, since they pay no tax, receive no credit). See H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 7–8, A16–A17 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4032, 4152–4153); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 8–9, 165–166 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4637, 4799–4801). Furthermore, Congress, in establishing the social security system was concerned with helping persons in economic need and therefore provided benefits substantially disproportionate to the length

of service rendered. On the other hand, the civil service retirement system provides benefits directly related to length of service and to the salary earned. See Hearings Before a Subcommittee of the Senate Committee on Post Office and Civil Service on S. 2875, 84th Cong., 2d Sess., p. 24. In the light of these differences in the two systems, Congress has not acted beyond its broad powers by exempting social security payments from tax while providing a tax credit for civil service retirement annuities. See *Barclay & Co.* v. *Edwards*, 267 U.S. 442, 450; *Foley Securities Corp.* v. *Commissioner*, 106 F. 2d 731, 735–736 (C.A. 8).

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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